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Supreme Court of the United States.

OCTOBER TERM, 1940.

314-630
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No. 1068 93

M. JACOBSON & SONS TRUST,
Petitioner,
v.
DOUGLASS M. BOMEISLER ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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Attorney for Petitioner.

FRANK P. RYAN,
SAMUEL PERMAN,
BERGE C. TASHJIAN,
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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, M. Jacobson & Sons Trust, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit entered March 17, 1941 (Record, p. 38), reversing with directions the judgment of the District Court of the United States for the Massachusetts District entered April 9, 1940 (R. 13).

STATEMENT OF THE MATTER INVOLVED.

This suit was brought to recover $5458.34, the balance alleged to be due the plaintiffs, Douglass M. Bomeisler *et al.*, a brokerage firm, from the defendant, M. Jacobson & Sons Trust, a Massachusetts business trust, on an account carried

between the parties for the execution of purchases and sales of contracts for future delivery on the New York Commodity Exchange (R. 2-6).

The defendant asserts that it is not liable to the plaintiffs because the transactions which form the basis of the plaintiffs' claim were speculative and, hence, outside the purposes of the defendant trust; and because Eli Jacobson, one of the defendant's trustees, did not have authority to enter into these transactions on the defendant's account. By counterclaim the defendant seeks to recover $7933.39, the amount by which payments made by it to the plaintiffs exceeded payments made by the plaintiffs to the defendant (R. 7, 8).

The defendant is a Massachusetts business trust organized pursuant to Massachusetts General Laws (Ter. Ed.) c. 182, under a written declaration of trust dated August, 1931, and filed with the Department of Corporations & Taxation for the Commonwealth of Massachusetts on September 30, 1931, a copy of which was offered as an exhibit by the plaintiffs (R. 19) and may be found in the record (R. 85-90).

The defendant's declaration of trust entrusted the active management of its business to three trustees, Eli Jacobson, N. Robert Jacobson, and Nathan L. Jacobson (R. 85-86). The declared purposes of the trust are set forth in the record (R. 85, 86).

In 1936 Eli Jacobson opened an account with the plaintiffs, in the name of the defendant trust, for the purchase of contracts on margin for the future delivery of hides (R. 19). Over the course of two and a half years, Eli Jacobson ordered the purchase of approximately fifty futures contracts, each contract involving approximately 40,000 pounds of hides with an average value of $4000 (R. 46). The contracts were always sold before delivery date, and hence no hides were actually delivered as a result of the transactions between the plaintiffs and the defendant (R. 43), but from

time to time balances were struck and the plaintiffs would mail a check to Eli Jacobson payable to the Chicago Dressed Beef Company, or Eli Jacobson would mail the plaintiffs the defendant's check to make up the loss.

The case was tried to a jury, and a verdict was returned for the plaintiffs on their claim in the sum of $5458.34 (R. 11); and on the defendant's counterclaim a verdict was returned for the plaintiffs (R. 11). Thereupon judgment was entered on April 5, 1940, in accordance with the verdicts (R. 11). On April 9, 1940, the judgment for the plaintiffs on its claim was reopened, the jury verdict set aside, and judgment was entered for the defendant in accordance with its motion for a directed verdict; the judgment for the plaintiffs on the defendant's counterclaim was allowed to stand (R. 12, 13).

From the foregoing final judgments both parties appealed to the Circuit Court of Appeals, First Circuit, where the judgment for the plaintiffs on the defendant's counterclaim was affirmed, and the judgment for the defendant on the plaintiffs' claim was reversed, and judgment ordered for the plaintiffs in accordance with the jury verdict (R. 138).

Jurisdiction.

This suit was commenced in the United States District Court for the District of Massachusetts on the ground of diversity of citizenship, the matter in controversy exceeding, exclusive of interest and costs, the sum of three thousand dollars ($3000).

The final judgment of the Circuit Court of Appeals for the First Circuit was entered March 17, 1941 (R. 138). The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals for the First Circuit is invoked under section 240 (a) of the Judicial Code (28 U.S.C. section 347 (a)).

Questions Presented.

The Circuit Court of Appeals for the First Circuit in reversing the decision and judgment of the United States District Court for the Massachusetts District has held—

1. That the defendant, organized as a trust for business purposes, can engage in speculative enterprises, and is bound by contracts involving speculation in futures contracts;
2. That the acts of one of the trustees could be ratified and were ratified by the other trustees by knowledge of the dealings of one and failure to object; and
3. That the contracts were not gaming contracts, illegal, and therefore unenforceable.

The judgment of the District Court should have been affirmed if any one of the above three propositions is not sound or in accordance with the established principles of law, and those questions are presented for determination by this Court.

Reasons for Granting the Writ.

The petitioner is aware that the denial or granting of certiorari is a discretionary matter, but respectfully urges an allowance of a writ in this case because the decision of the Circuit Court of Appeals for the First Circuit is in direct conflict with the applicable decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts with respect to the powers of trustees and trusts. This is an important matter of local law since the business trust is a widely used form of business organization involving a fiduciary relationship.

In addition to the above it is respectfully submitted that the reversal of the action of the District Court manifests on its facts a conflict between that Court and the Circuit Court of Appeals for the First Circuit. The decision is directly in conflict with the holding of the United States District Court for the District of Georgia.

It is therefore respectfully requested that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals, for the First Circuit, reversing that of the District Court for the District of Massachusetts, be granted.

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